No. 97-1137

(4)

Supreme Court, U.S.
FILED
MAR 9 1998
CLERK

In The

Supreme Court of the United States

October Term, 1997

CYPRUS BAGDAD COPPER CORPORATION; CYPRUS AMAX MINERALS COMPANY; RANDY SCOTT, husband; JANE DOE SCOTT, wife; GARY HUTCHINSON, husband; KATHLEEN HUTCHINSON, wife, aka JANE DOE HUTCHINSON; JANETTE BUSH, wife; JOHN DOE BUSH, husband; JOSEPH MORTIMER, husband; JANE DOE MORTIMER, wife; JACK McKEON, husband; JANE DOE McKEON, wife; PAUL AUSTIN, husband; JANE DOE AUSTIN, wife; RAYMOND BRAMLETT, husband; JANE DOE BRAMLETT, wife; LLOYD FLANNIGAN, husband; JANE DOE FLANNIGAN, wife,

Petitioners,

v.

MELTON NELSON; LANITA NELSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

MICHAEL E. MEDINA, JR., ESQ.
Counsel of Record
KIMBLE, NELSON, AUDILETT, McDONOUGH & MOLLA, P.C.
5285 E. Williams Circle
Suite 3500
Tucson, AZ 85711
(520) 748-2440

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

app.

QUESTION PRESENTED

Did the court properly rule that Nelson was entitled to bring suit in federal court and not required to arbitrate his federal and state statutory discrimination claims when it is undisputed that (1) Nelson never signed an agreement to arbitrate his federal and state statutory discrimination claims and (2) both federal and state law require a knowing and voluntary waiver before an employee is required to arbitrate his federal and state statutory discrimination claims.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

A. Proceedings Below 1

B. Material Facts 1

REASONS TO DENY THE PETITION 3

A. The Arbitration Clause at Issue Contained Factual Idiosyncracies Which Establish Certiorari Should Not Be Granted 3

B. Arizona Law Requires a "Knowing and Voluntary" Waiver Before an Arbitration Clause is Enforceable Regarding Statutory Discrimination Claims 6

C. There Is No Conflict with Decisions of this Court 8

D. There Is No Conflict Amongst the Circuits Regarding the Knowing and Voluntary Standard 10

CONCLUSION 13

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

AT & T Techologies v. Communications Workers of America, 475 U.S. 643 (1986) 10

Berger v. Cantor Fitzgerald Securities, 942 F. Supp. 963 (S.D.N.Y. 1996) 13

Broemer v. Abortion Services of Phoenix, Ltd., 173 Ariz. 148, 840 P.2d 1013 (1992) 7, 8

Doctor's Associates, Inc. v. Casarotto, ___ U.S. ___, 116 S. Ct. 1652 (1996) 9

Duncan v. St. Joseph's Hospital, 183 Ariz. 349, 903 P.2d 1107 (App. 1995) 6

First Options of Chicago v. Kaplan, 514 U.S. 938 (1995) 9

Francini v. Phoenix Newspapers, Inc., 188 Ariz. 576, 937 P.2d 1382 (1996) 6, 7

Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126 (7th Cir. 1997) 11, 12

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 9

Heurtebise v. Reliable Business Computers, 550 N.W.2d 244 (Mich. 1996) 13

Hoffman v. Aaron Kahmi, Inc., 927 F. Supp. 640 (S.D.N.Y. 1996) 13

Liekvold v. Valley Community Hospital, 141 Ariz. 544, 688 P.2d 170 (1984) 6

Ludwig v. Equitable Life Assurance Society of the U.S., 978 F. Supp. 1379 (D. Kan. 1997) 13

TABLE OF AUTHORITIES – Continued

Page

Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 9, 10

O'Neil v. Hilton Head Hospital, 115 F.3d 272 (4th Cir. 1997) 11

Patterson v. Tenet Health Care, Inc., 113 F.3d 832 (8th Cir. 1997) 10, 11, 12

Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997) 10

Ramirez-De-Arellano v. American Airlines, 133 F.3d 89 (1st Cir. 1997) 11

Wagner v. City of Globe, 150 Ariz. 82, 722 P.2d 250 (1986) 6

STATEMENT OF THE CASE

A. Proceedings Below

Nelson disagrees with Cyprus' contention that the district court held the arbitration clause was valid under Arizona law. Cyprus' statement implies the district court did not address the "knowing and voluntary" requirement. The district court did discuss the validity of the arbitration clause under Arizona law (Supp. App. 4-5), and also addressed the "knowing and voluntary" requirement. (Supp. App. 5-7). The district recognized a distinction existed between any Arizona common law claims and Nelson's discrimination claim when it set forth two separate arguments to address these distinct claims. (Supp. App. at 4-7).

Moreover, the Ninth Circuit pointed out in its decision that the waiver of a federal right involved a question of federal law. (App. 14).

B. Material Facts

Nelson was a full-time employee of Cyprus for approximately 19 years at the Cyprus' mine located in Bagdad, Arizona. (App. 2). In 1993, after Nelson had worked for Cyprus for almost eighteen years, Cyprus unilaterally promulgated an employee handbook that was to become effective July 1, 1993. (App. 3-4). The handbook contained a "Problem Solving Process." (App. 30-35). The process provided a "Complaint Resolution Policy." (App. 31-35). The Complaint Resolution Policy contained an abtitration clause. (App. 33-35). The clause located prior to the arbitration clause provided in part:

> If you are not satisfied with the Vice President's response in cases involving corrective action, discharge, or the Equal Opportunity/Non-harassment policy, you may appeal to arbitration. The appeal to arbitration must be in writing and must be submitted to the Human Resources Department within 10 calendar days after you receive the Vice President's response to your appeal.

(App. 33). The arbitration clause was found at pages 12-13 of the handbook. The handbook also contained an acknowledgment form which provided:

> I have received a copy of the Cyprus Bagdad Copper Corporation Handbook that is effective July 1, 1993 and understand the Handbook is a guideline to the Company's policies and procedures. I agree to read it and understand its contents. If I have any questions regarding its contents I will contact my supervisor or Human Resources Representative.

(App. 37-38). The acknowledgment form was located in the back of the handbook, which contained fifty-eight pages of material.

At no time prior to the effective date of the handbook or afterwards was Nelson informed that the handbook contained an arbitration clause which precluded him from bringing a cause of action for violation of federal and state anti-discrimination laws. (App. 12-13).

REASONS TO DENY THE PETITION

This Court should not grant Cyprus' petition for writ of certiorari because the Ninth Cirucit decision is limited to the factual idiosyncracies of the particular arbitration clause that was at issue. There is no conflict between the decision and this Court's decisions regarding the application of federal and state law to arbitration clauses relating to waiver of federal rights. There is no conflict amongst the circuits regarding the application of the "knowing and voluntary" standard to federal statutory claims.

A. The Arbitration Clause at Issue Contained Factual Idiosyncracies Which Establish Certiorari Should Not Be Granted.

In July 1993, the Cyprus Employee Handbook, at issue in this case, became effective. (App. 3-4). The handbook contained a "Problem Solving Process" which was found at pages 10-13 of the handbook. (App. 30-35). The "Problem Solving Process" provided a "Complaint Resolution Policy" which contained an arbitration clause. (App. 33-35). The clause located immediately prior to the arbitration clause, which was entitled "Appeal to the Vice President", noted:

> If you are not satisfied with the Vice President's response in cases involving corrective action, discharge, or the Equal Opportunity/Non-harassment policy, you may appeal to arbitration. The appeal to arbitration must be in writing and must be submitted to the Human Resources Department within 10 calendar days after you receive the Vice President's response to your appeal.

In the back of the handbook, there was an acknowledgment form that employees were required to sign and return to Cyprus. (App. 37-38). The acknowledgment declared:

> I have received a copy of the Cyprus Bagdad Copper Corporation Handbook that is effective July 1, 1993 and understand the Handbook is a guideline to the Company's policies and procedures. I agree to read it and understand its contents. If I have any questions regarding its contents I will contact my supervisor or Human Resources Representative.

(*Id.*).

The decision by the Ninth Circuit pointed out the acknowledgment failed to notify an employee that the handbook contained an arbitration clause or that acceptance waived an employee's rights to a judicial forum. (App. 12-13). The Ninth Circuit noted the acknowledgment simply provided that an employee agreed to "read and understand" the Handbook. (*Id.*). There was nothing in the agreement that indicated the employee agreed to be bound by the Handbook. (App. 12). The Ninth Circuit also pointed out the terms of the Handbook indicated the Handbook was a "guideline" to Cyprus' policies and procedures. (App. 13). Nelson also was not informed by any representative of Cyprus that the arbitration clause waived his rights to bring a statutory discrimination claim. The terms of the acknowledgment of receipt of the handbook establish that Nelson did not have access to the handbook before signing the acknowledgment. By simply signing that he had received the employee handbook, Mr. Nelson did not agree to forego his rights to the remedies

and procedures under statutory discrimination provisions. These facts establish the distinct nature of the Cyprus' handbook and reflect that certiorari should not be granted.

Moreover, since the decision in this case was rendered, Cyprus has substantially modified its employee handbook. Nelson recognizes the modified Employee Handbook, which became effective August 1, 1997, was not before the Ninth Circuit and did not influence the decision in this matter.[1] Nevertheless, the modified handbook establishes the issue is not one of importance worthy of certiorari since Cyprus, itself, has modified its handbook and any decision by this Court will only affect Nelson.

The modified handbook demonstrates that Cyprus and other employers can draft handbooks that conform to the "knowing and voluntary" standard. The modified handbook contains a separate appendix which contains the "Problem Solving Process." The acknowledgment has been modified to provide:

> I have received a copy of the Cyprus Bagdad Copper Corporation Problem Solving Process that is effective August 1, 1997. I understand that this Problem Solving Process is meant to be an enforceable contract between me and Cyprus Bagdad. I agree to read it and understand its contents. If I have any questions regarding its

---

[1] A copy of the modified Employee Handbook is attached as an Appendix to this opposition.

contents, I will contact my supervisor or my Human Resources Representative.

B. Arizona Law Requires a "Knowing and Voluntary" Waiver Before an Arbitration Clause is Enforceable Regarding Statutory Discrimination Claims.

Cyprus contends the Ninth Circuit erroneously disregarded Arizona law and has applied a federal standard when determining whether a valid arbitration agreement existed. Cyprus' contentions are unpersuasive since Arizona case law has also applied the "knowing and voluntary" standard and held arbitration clauses contained in preprinted forms and offered on a "take it or leave it basis" to be unenforceable adhesion contracts.

Any distinction between federal and Arizona law regarding the enforceability of arbitration clauses in the employment area ended with the Arizona Court of Appeals decision in *Francini v. Phoenix Newspapers, Inc.*, 188 Ariz. 576, 937 P.2d 1382 (1996).[2] Unlike the Arizona

---

[2] The Arizona decisions cited by Cyprus, *Liekvold v. Valley Community Hospital*, 141 Ariz. 544, 688 P.2d 170 (1984); *Wagner v. City of Globe*, 150 Ariz. 82, 722 P.2d 250 (1986); *Duncan v. St. Joseph's Hospital*, 183 Ariz. 349, 903 P.2d 1107 (App. 1995), did not address the issue of whether an employer could preclude an employee from bringing a statutory discrimination claim by unilaterally requiring an employee to follow an internal grievance policy. These decisions simply indicate that an employee handbook may become part of the employment relationship not that an employer may by a handbook usurp the power of Congress and preclude an employee from pursuing federal statutory remedies in federal court.

decisions cited by Cyprus, in *Francini* the issue before the court was whether an employee's disability discrimination action had been properly dismissed because the employee had not utilized the employer's grievance procedures including an arbitration clause. *Id.* at 578, 937 P.2d at 1384. The court held:

> Even an employee who enters into an individual employment agreement may not be deemed to have waived the statutory rights, remedies, and procedural protections contained in Title VII and related state remedies unless the employee knowingly agreed to arbitrate employment disputes. *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1304-05 (9th Cir. 1994), *cert. denied*, ___ U.S. ___, 116 S. Ct. 61 (1995).

Id. at 583, 937 P.2d at 1389 (footnote omitted).

Previous to the *Francini* decision, the Arizona Supreme Court had held in an analogous situation that an arbitration clause contained on a preprinted form that was required to be signed by patients as a condition of treatment was not enforceable because it was an adhesion contract. *Broemmer v. Abortion Services of Phoenix, Ltd.*, 173 Ariz. 148, 840 P.2d 1013 (1992). The court found the printed form agreement contained all the characteristics of a contract of adhesion. *Id.* at 151, 840 P.2d at 1016. The court explained:

> The form is a standardized contract offered to plaintiff on a "take it or leave it" basis. In addition to removing from the courts any potential dispute concerning fees or services, the drafter inserted additional terms potentially advantageous to itself requiring the arbitrator appointed by the American Arbitration Association by

> a licensed medical doctor specializing in obstetrics/gynecology. The contract was not negotiated but was, instead prepared by the defendant and presented to plaintiff as a condition of treatment. Staff at the clinic neither explained its terms to plaintiff nor indicated that she was free to refuse to sign the form; they merely represented to plaintiff that she had to sign the three forms.

Id. The court found the arbitration clause was not within the patient's reasonable expectations and was unenforceable. *Id.* at 152, 840 P.2d 1017. The court also held the arbitration clause could have been unenforceable because it was unconscionable. *Id.*

Based upon these decisions, the application of Arizona law would not have altered the decision rendered by the Ninth Circuit. Arizona law requires before an employee may have been deemed to forego statutory rights that the employee must have knowingly agreed to arbitrate the employment disputes. Arizona law is consistent with federal law in this realm. Additionally, Arizona law has rendered arbitration clauses such as those contained in the Cyprus' handbook to be unenforceable adhesion contracts.

C. There Is No Conflict with Decisions of this Court.

The decisions of this Court that Cyprus relies upon for the proposition that state law applies to determine whether there has been an agreement to arbitrate are

distinguishable.[3] *First Options of Chicago*, 514 U.S. 938 (1995) and *Doctor's Associates, Inc. v. Casarotto*, ___ U.S. ___, 116 S. Ct. 1652 (1996). The issues in *First Options* did not involve any federal rights and instead simply involved the issue of whether a husband and wife were personally liable for the debts that a corporation owed to a firm that clears stock trades. 514 U.S. at 942. Likewise, in *Doctor's Associates*, the issues involved a standard franchise agreement and did not implicate any federal rights. ___ U.S. at ___, 116 S. Ct. at 1654. The question before the Ninth Circuit involved federal law, in particular the Americans with Disabilities Act.

This Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991), held it was appropriate to examine the legislative text and history to determine Congress' intent regarding waiver of statutory rights under federal anti-discrimination statutes. Therefore, necessarily the arbitrability of federal statutory claims involves federal law and not only state law. The legislative history of the Americans with Disabilities Act reveals any waiver should be "knowing and voluntary."

Furthermore, this Court has held "courts should remain attuned to well-supported claims that the agreement resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.' " *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991), *quoting*, *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614,

---

[3] Additionally, as noted supra, the application of state law would yield the same result.

627 (1985). This Court has also held a party cannot be bound to an arbitration agreement, unless he or she actually agreed to submit the specific claim to arbitration. *AT & T Techologies v. Communications Workers of America*, 475 U.S. 643 (1986), *see also, Mitsubishi Motors Corp.*, 473 U.S. at 626 (the threshold question must always be whether the agreement to arbitrate was voluntary and intentional). Finally, as one court has noted, it would be paradoxical for Congress to have given employment discrimination plaintiffs the rights to a jury trial for the first time and to have enabled those rights to have been taken away without their consent. *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir. 1997).

The Ninth Circuit correctly held under federal and state law there must have been a "knowing and voluntary" waiver.

D. There Is No Conflict Amongst the Circuits Regarding the Knowing and Voluntary Standard.

The arbitration clause contained in the Court of Appeals decisions cited by Cyprus are distinguishable. *Patterson v. Tenet Health Care, Inc.*, 113 F.3d 832, 835 (8th Cir. 1997). *Id.* The arbitration clause in *Patterson* was separate and distinct from the other provisions of the handbook. *Id.* It contained an acknowledgement form which contained language such as "I understand" and "I agree." *Id.* The acknowledgment specifically provided "I agree to submit any complaints to the published process and agree to abide by and accept the final decision of the arbitration panel . . . " *Id.* Because the court deemed these

actions *in toto* sufficient to render the arbitration clause "separate and distinct" from the remainder of the handbook the court held the internal grievance and arbitration clause constituted an enforceable contract. *Id.*

The arbitration clause in *O'Neil v. Hilton Head Hospital*, 115 F.3d 272, 275 (4th Cir. 1997), contained identical language to that found in *Patterson*. Thus, *O'Neil* can be similarly distinguished from the Ninth Circuit's decision.

Recently, the circuits that have rendered decisions on the issue have held the knowingly and voluntary standard applies to arbitration clauses involving waiver of statutory claims under federal anti-discrimination laws. *Ramirez-De-Arellano v. American Airlines*, 133 F.3d 89, 90-91 (1st Cir. 1997); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1129-30 (7th Cir. 1997).

In *Ramirez-De-Arellano*, the First Circuit was faced with the same issue presented to the Ninth Circuit, whether an arbitration clause contained in an unilateral and adhesive employee handbook was enforceable. 133 F.3d at 90. The First Circuit found "the threshold question for review must always be whether the agreement to arbitrate was, indeed, voluntary and intentional." *Id.* The court held:

> Given the apparently unilateral and adhesive nature of American's employee handbook, we do not embrace the argument that Ramirez voluntarily waived his right to pursue his claims in federal court.

Id. at 90-91. In a footnote supporting its decision, the First Circuit cited the Ninth Circuit's decision in this case. *Id.* at 91, note 2. The First Circuit was also able to apply this

decision and the *Patterson* decision without any difficulty. *Id.* The First Circuit having pointed out distinctions between the arbitration clause contained in this case and the arbitration clause in *Patterson. Id.*

The Seventh Circuit has held the strongest case for finding an employee agreed to arbitration is "when the record indicates the employee has knowingly agreed to do so." *Gibson,* 121 F.3d at 1130. The court pronounced if such conditions are present then "the twin goals of protecting federal rights and resolving claims through arbitration will be effected." *Id.* The court did decline to address whether a "knowing and voluntary" consent is required, the court did declare "we therefore stress the advantage of arbitration agreements that are the product of an employee's knowing and voluntary consent, . . . " *Id.* The court noted the knowing and voluntary requirement and ensuring that employees understand the agreement "need not be unduly burdensome." *Id.*

The court did hold the arbitration clause was invalid because there was no bargained for consideration. *Id.* at 1130. The court rejected that the employee's continued employment was sufficient consideration. *Id.* at 1132. The court explained:

> NHC never made a promise to continue Gibson's employment in exchange for her promise to submit her claims to arbitration. That is, it never communicated to her that if she signed the Understanding she could continue to work there, and that if she did not her status would be uncertain.

Id.

Several other courts have applied the "knowing and voluntary" standard to cases involving the arbitrability of statutory discrimination claims. *Berger v. Cantor Fitzgerald Securities*, 942 F. Supp. 963 (S.D.N.Y. 1996) (the issue of notice is relevant to the scope of an arbitration agreement and whether a voluntary agreement to arbitrate was made); *Hoffman v. Aaron Kahmi, Inc.*, 927 F. Supp. 640 (S.D.N.Y. 1996) (arbiration clause did not put employee on notice he was waiving his rights to pursue discrimination claim in federal court); *Heurtebise v. Reliable Business Computers*, 550 N.W.2d 244 (Mich. 1996) (handbook did not create enforceable arbitration agreement since employer did not intend to be bound by any provision contained in handbook); *Ludwig v. Equitable Life Assurance Society of the U.S.*, 978 F. Supp. 1379 (D. Kan. 1997). These cases establish the "knowing and voluntary" standard is accepted beyond the Ninth Circuit and has been applied to employment discrimination cases.

CONCLUSION

Based upon the foregoing, this Court should deny Cyprus' petition for writ of certiorari.

Respectfully submitted,

MICHAEL E. MEDINA, JR., ESQ.
Counsel of Record
KIMBLE, NELSON, AUDILETT,
McDONOUGH & MOLLA, P.C.
5285 E. Williams Circle
Suite 3500
Tucson, AZ 85711
(520) 748-2440

Attorneys for Respondents

Cyprus Bagdad Copper Corporation

PROBLEM SOLVING PROCESS

I have received a copy of the Cyprus Bagdad Copper Corporation Problem Solving Process that is effective August 1, 1997. I understand that this Problem Solving Process statement is meant to be an enforceable contract between me and Cyprus Bagdad. I agree to read it and understand its contents. If I have any questions regarding its contents, I will contact my supervisor or my Human Resources Representative.

Date _____ Name _____
(Please Print Name)

Signature _____

Copy A – Employee Copy